TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1931~~ 1932

No. ~~819~~ 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, PETITIONER,

vs.

WINNIE BURTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 22, 1932

CERTIORARI GRANTED APRIL 18, 1932

(36,633)

(36,633)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 28, 1932

[fol. 1] [Captions omitted]

IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

No. 209,724

WINNIE BURTON, 1315 Belmont Street N. W., Washington, D. C., Plaintiff,

vs.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, a Corporation, Chicago, Illinois; Branch Office, Carpenter Building, 10th and K Streets N. W., Washington, D. C., Defendant.

PARTICULARS OF DEMAND—Filed May 21, 1930

The plaintiff sues the defendant for Three Hundred Seventy-One Dollars ($371) with interest thereon from May [fol. 2] 22, 1929, for money payable by the defendant to the plaintiff, said amount representing the face value of the policy issued by the defendant to one Cady B. Burton, who dies May 22, 1929. Proper notices and proofs of death having been furnished to the said defendant and it having failed, neglected and declined to pay the same or any part thereof.

Wherefore the plaintiff brings this suit and claims of and from the defendant said sum of $371 with interest thereon from May 22, 1929, besides costs.

W. Gwynn Gardiner and George A. Maddox, Attys. for Plaintiff, 1102 Woodward Building, Washington, D. C.; Phone: National 5657, by George A. Maddox.

IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

FINDING OF THE COURT—June 9, 1930

Mins. 50, P. 49

Comes now the parties hereto and thereupon this cause being heard and submitted the Court finds in favor of the

plaintiff, the sum of Three Hundred seventy two dollars ($372) with interest from May 22, 1929.

In Municipal Court of District of Columbia

Judgment—June 14, 1930

Mins. 50, P. 63

It appearing under rule of Court that Judgment on the finding in this cause should be entered, it is so ordered. Wherefore, it is considered that plaintiff recover of defendant the sum of Three Hundred seventy two dollars ($372) with interest from May 22, 1929, and costs; and have execution thereof.

Further, defendant's counsel advises the Court that he may wish to apply for a Writ of Error and moves that the Court fix the maximum amount of an undertaking to operate as a supersedeas, and the Court thereupon fixes the same in the sum of Five Hundred dollars ($500).

[fol. 3] [File endorsement omitted]

In Municipal Court of the District of Columbia

[Title omitted]

Bill of Exceptions—Filed July 9, 1930

Be it remembered, that at the trial of the above case before Honorable Robert F. Mattingly, Judge of the Municipal Court of the District of Columbia, the plaintiff to maintain the issues on her part joined, introduced into evidence a certain policy of insurance dated the 12th day of December, 1927, whereby the defendant, The Washington Fidelity National Insurance Company, insured the life of one Cady Burton for the amount of Three Hundred and Seventy-two ($372.00) Dollars, the beneficiary named in said policy being the plaintiff herein. The said policy of Insurance contained, among other things, the following:

"In Consideration of the payment of the premium stated in the schedule on page 4 hereof, on or before each Monday, Doth Hereby Agree, subject to the conditions below and on page 2 hereof, each of which is hereby made a part of this

contract and contracted by the Insured and every person entitled to claim hereunder to be a part hereof, to pay upon receipt of proof of the death of the Insured, made in the manner, to the extent and upon the blanks required herein, and upon surrender of this Policy and evidence of premium payment hereunder, the amount stipulated in said schedule, to the executor or administrator of the insured, unless payment be made under the provisions of the next succeeding paragraph.

"The Company may make any payment or grant any non-forfeiture privilege provided herein to the Insured, husband or wife, or any relative by blood or connection [fol. 4] by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, or for his or her burial; and the production of a receipt signed by any one of said persons, or of other proof of such payment or grant of such privilege to any of them, shall be conclusive evidence that all claims under this Policy have been satisfied.

"The Conditions, Privileges and Concessions to Policyholders, Schedule on page 4 hereof, and any endorsement either printed or written as made by the Company, on any of the pages following are a part of this contract as fully as if recited over the signatures hereto affixed.

"In witness whereof the said Washington Fidelity National Insurance Company has, by its President and Secretary, signed and delivered this Policy on the date hereof as stated on page 4."

The Conditions on page 2 of the said policy are the following:

"This Policy constitutes the entire agreement between the Company and the Insured and the holder and owner hereof. Its terms cannot be changed, or its conditions varied, except by the express agreement of the Company evidenced by the signature of its President or Secretary. Therefore, Agents (which term includes also Managers and Assistant Managers) are not authorized and have no power to make, alter, or discharge contracts, to waive forfeitures or to receive premiums on Policies more than four weeks in

arrears, or to receipt for the same, and the payment to an Agent of any such arrears shall be at the sole risk of the person making such payment and shall not be credited as a payment upon the policy, whether receipt be given for such payment or not.

"If any premium under this Policy shall not be paid when due, the Policy shall lapse, subject to the provision for Grace Period and to the Non-Forfeiture Privileges as herein contained, and such lapse shall not be considered to have been waived by the Company in any respect by reason of the acceptance of overdue premiums upon this or any other Policy.

[fol. 5] "If, (1) the Insured is not alive or is not in sound health on the date hereof; or if (2) before the date hereof, the Insured has been rejected for insurance by this or by any other company, order or association, or has within two years before the date hereof, been attended by a physician for any serious disease or complaint, or, before said date, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the "Space for Endorsements" on page 4 in a waiver, signed by the Secretary; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date hereof, unless the number of such prior Policy has been endorsed by the Company in the "Space for Endorsements" on page 4 hereof, (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known of the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition) then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud in which case all premiums will be forfeited to the Company.

"If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premiums paid hereon would have purchased at the correct age. If the Insured within one year from the date of issue hereof die by his own hand or act, whether sane or insane, the liability

of the Company hereunder shall be limited to an amount equal to the premiums which have been received, without interest.

"The Company assumes no obligation prior to the date hereof. Any assignment or pledge of this Policy or of any benefits hereunder shall be void and of no effect. In any settlement under this Policy, any indebtedness to the Company hereunder shall be deducted.

"Proof of death shall be made upon blanks to be furnished by the Company and shall contain the answer to each question propounded to the claimant, to physicians and to other persons, and shall contain the record, evidence, [fol. 6] and verdict of the coroner's inquest, if any be held. All the contents of such proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the Company."

The Policy further provides thus:

"Incontestability.—This Policy shall be incontestable after it has been in force, during the lifetime of the Insured, for a period of two years from the date of its issue, except for non-payment of premiums, fraud or misstatement of age."

There was no endorsement on page 4 of the said policy and no copy of an application for the policy was attached thereto.

Further to maintain the issues the plaintiff offered in evidence the premium receipt books showing payments of premiums from the issuance of the policy until the time of the death of the insured which occurred on May 22, 1929. He also offered the Claimant's Certificate of Death and the Attending Physician's Certificate of Death and stated to the Court with the assent of counsel for the defendant that there was no controversy between the plaintiff and the defendant as to the fact of death, and that the company had declined to pay to the plaintiff the Three Hundred and Seventy-two Dollars ($372) as provided by the terms of the policy; that the insured, when insured, lived in the District of Columbia, and this policy was delivered to him in the District of Columbia where premiums due were paid. Plaintiff thereupon rested. Whereupon the defendant to maintain the issues upon its part to be maintained placed

upon the witness stand the Assistant Cashier of the Washington City Post Office who stated that he had appeared in answer to a subpœna duces tecum addressed to the Postmaster and had produced records showing the number of days of annual leave without pay and of sick leave which had been taken by the insured, Cady Burton, during the calendar years 1926, 1927, 1928, and the period from January 1, 1929, to May 22, 1929. The witness stated that he could from the records state the number of days each of annual leave, leave without pay and sick leave which the said Cady Burton had taken during the calendar years 1926, [fol. 7] 1927 and 1928, and the period from January 1, 1929 to May 22, 1929, inclusive. Counsel for the defendant asked the witness to examine the records and state to the Court the facts with reference to the leave taken by the said Cady Burton during the periods mentioned to which counsel for the plaintiff objected upon the ground that the defendant was apparently about to introduce a defense under the terms of the policy of insurance. Thereupon counsel for the defendant stated to the Court that the policy of insurance provided that if the insured was not in sound health at the date thereof the policy should not become effective and that he proposed to prove that at the date of the issuance of the policy sued upon the said Cady Burton was not in sound health. Counsel for the plaintiff thereupon objected to any proof being offered by the defendant of the unsound health of the insured on the ground that there was not attached to the policy a copy of the application therefor. Counsel for the defendant stated to the Court that he was making no defense based upon any application; that no application was in evidence and there was no evidence that there had been any written application for the policy in suit. Counsel for the plaintiff then stated that there was a written application, that it had been delivered to the company and no copy of the application had been attached to the policy delivered to the insured. Counsel for the defendant then stated that if that were the case the plaintiff should prove it, and the counsel for the plaintiff responded that the proof was for the defendant. The Court sustained the objection of the plaintiff, excluded the testimony offered and ruled that the defendant would not be permitted to introduce any evidence of the violation of any terms of the policy, to which rulings the defendant excepted. The de-

fendant thereupon stated to the Court that its entire defense was based upon the violation of the terms of the policy sued upon and the Court thereupon ruled that defendant could not be heard to make any such defense where a copy of the application had not been attached to and delivered with the policy. To which ruling defendant duly excepted. Thereupon the Court found for the plaintiff in the full amount claimed. And defendant in open Court gave notice of its intention to apply to the Court of Appeals for a writ of error.

[fol. 8] And the defendant by its attorneys requested the Judge presiding at the trial to sign, seal and make a part of the record this Bill of Exceptions, which is accordingly done, now for then, this 9th day of July, A. D. 1930.

Robt. E. Mattingly, Judge.

[File endorsement omitted.]

In Municipal Court of the District of Columbia

[Title omitted]

Assignment of Errors—Filed July 12, 1930.

Comes now the defendant, through its attorneys, and for Assignment of Errors says that the Court erred:

1. In refusing to admit any evidence on behalf of defendant of the insured's condition of health at the time of the issuance of the policy by defendant.

2. In excluding the testimony offered by defendant as to the number of days of annual leave, leave without pay, and sick leave taken by the deceased during the calendar years 1926, 1927, 1928 and 1929.

3. In refusing to admit evidence on behalf of the defendant that insured was not in sound health at the time the policy was issued.

4. In ruling that the defendant would not be permitted to introduce any evidence of the violation of any terms of the policy because no copy of an application had been attached to and delivered with the policy.

5. In entering a finding for the plaintiff.
6. In entering judgment for the plaintiff.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Defendant.

[fol. 9] [File endorsement omitted]

IN MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed July 12, 1930

The appellant (defendant) hereby makes the following designation of record for the Court of Appeals pursuant to the Writ of Error granted in the above-entitled cause:

1. Particulars of Demand.
2. Finding of the Court.
3. Judgment.
4. Bill of Exceptions.
5. Assignment of Errors.
6. This Designation.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Defendant.

IN MUNICIPAL COURT OF DISTRICT OF COLUMBIA

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Robert E. Mattingly, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Winnie Burton, Plaintiff, and Washington Fidelity National Insurance Company, a Corporation, Defendant, No. 209,724, a manifest error hath happened, to the great damage of the said Defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and [fols. 10 & 11] full and speedy justice done to the parties

aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 27th day of June, in the year of our Lord one thousand nine hundred and thirty.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

Allowed by

Josiah A. Van Orsdel, Associate Justice of the Court of Appeals of the District of Columbia.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 12] Minute entry of argument and submission, December 11, 1931, omitted in printing.

[fol. 13] In Court of Appeals of the District of Columbia

No. 5264

Washington Fidelity National Insurance Company, a Corporation, Plaintiff in Error,

v.

Winnie Burton, Defendant in Error

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Washington, D. C., for appellant.

W. Gwynn Gardiner, George A. Maddox, Washington, D. C., for appellee.

Argued December 11, 1931. Decided January 25, 1932

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

HITZ, Associate Justice:

This case is here upon writ of error to the Municipal Court of the District of Columbia.

Defendant in error was plaintiff there in an action against plaintiff in error, defendant there, upon a policy of insurance for $372, issued on the life of her late husband Cady Burton, who died in this District, May 22, 1929.

The policy was dated December 12, 1927, and plaintiff was the beneficiary designated therein.

The defense offered was that the insured was not in sound health at the date of the policy and, therefore that the company could, as therein provided, declare the policy void.

The trial court refused to hear any evidence to maintain that defense because no copy of the application for insurance had been delivered with the policy as provided by Sec. 657, Code, D. C. (now title 5, sec. 183, page 20), reading as follows:

"Copy of application to be delivered with policy: Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application. (March 3, 1901, 31 Stat. 1294, c. 854, sec. 657; June 30, 1902, 32 Stat. 534, c. 1329.)"

[fol. 14] Defendant contended its defense was not precluded by that section because its policy provided, "This policy constitutes the entire agreement between the company and the insured the holder and owner hereof.

And that it was not defending on the application or anything contained therein.

But if it was not defending on the application, as such, it was defending on something contained in or omitted from the application.

The section of the policy on which it relied to avoid its obligation read:

"If (1) the insured is not alive, or is not in sound health on the date hereof; or if * * * the insured * * * has, within two years before the date hereof, been attended by a physician for any serious disease or complaint, * * * then in any such case, the company may declare the policy void and the liability of the company in the case of any such declaration or in the case of any claim under the policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud in which case all premiums will be forfeited to the company."

That policies of life insurance are issued upon applications containing applicant's version and representations as to those matters and things is common knowledge.

To the end that he, his beneficiary, and, if need be, the courts, might see exactly what he said in that connection, the statute provides that he, as well as the company, shall possess the entire contract. (Metropolitan Life Insurance Company v. Burch, 39 App. D. C. 405.)

And to accomplish that purpose it provides that unless the company delivers with the policy a copy of the application, no defense shall be allowed to such policy on account of anything contained in or omitted from the application.

That the defense in this case is upon something contained in or omitted from the application, there can be no doubt.

And the company can not avoid operation of the statute by including in its policy some statements of the application, while omitting the application itself. (Metropolitan Insurance Company v. Hawkins, 31 App. D. C. 498.)

Nor does the ex parte assertion of the policy that it alone constitutes the entire agreement between the parties alter the situation, for the statute intended to assist determination of rights under the policy by including therein the application therefor.

And where such an application has been made and acted upon but omitted from the policy, the statute precludes a

defense under the policy alone, if based upon matters to which the application relates.

The judgment is affirmed.

A true copy: Test:

—— ——, Clerk Court of Apeals, D. C.

[fol. 15] In Court of Appeals of District of Columbia

* * * * * * *

No. 5264, January Term, 1932

Washington Fidelity National Insurance Company, a Corporation, Plaintiff in Error,

vs.

Winnie Burton

Judgment—Jan. 25, 1932

In Error to the Municipal Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Municipal Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court in this cause be and the same is hereby affirmed.

Per Mr. Justice Hitz.

[fol. 16] In Court of Appeals of District of Columbia

[Title omitted]

Præcipe for Transcript of Record—Filed Feb. 15, 1932

The Clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The Printed Record.
2. Minute Entry showing Argument.
3. Opinion of the Court.

4. The Judgment.
5. This Designation.
6. Clerk's Certificate.

Walter C. Clephane, Walter C. Clephane, 1512 H St. N. W.; J. Wilmer Latimer, J. Wilmer Latimer, 1512 H St. N. W.; Gilbert L. Hall, Gilbert L. Hall, 1512 H St. N. W., Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fol. 17] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 18] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 18, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,633. District of Columbia Court of Appeals. Term No. 819. Washington Fidelity National Insurance Company, petitioner, vs. Winnie Burton. Petition for a writ of certiorari and exhibit thereto. Filed March 22, 1932. File No. 36,633.